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MONTHLY LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS AND AGENTS

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Military Application of the Sixth Amendment Right to Counsel in the wake of Montejo v. Louisiana[1]

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Montejo v. Louisiana

In Montejo v. Louisiana, decided in May 2009, the Supreme Court overruled Michigan v. Jackson[2], and apparently opened up a previously prohibited investigative avenue for law enforcement officers. Under the previous rule, once a criminal defendant invoked his Sixth Amendment right to counsel, police were prohibited from initiating contact with that defendant in an attempt to interrogate him on the charged offense unless his counsel was present.[3] In Montejo, the Court reexamined the propriety of this rule in the very common situation where a defendant has "passively" invoked his right to counsel at an initial appearance proceeding.[4] Although practices vary in different jurisdictions, most initial appearance proceedings include some procedure to ensure the defendant has counsel appointed.[5] In some cases, the defendant is asked if he wants counsel appointed, but in other jurisdictions counsel is appointed without any formal request from the defendant.[6] The Court reasoned that the Jackson rule was intended to prevent police from badgering a defendant into changing his mind about a previous decision to request counsel, but in this type of "passive" invocation situation, the defendant really had not made such a decision, other than perhaps to give an affirmative response to a judge's question.[7]

Faced with the impracticality of enforcing the Jackson rule in the wide variety of different initial appearance scenarios that might arise, the Supreme Court decided to simply eliminate the rule.[8] The Court noted that the full regime of Fifth Amendment protections of the right to counsel would still apply in any custodial interrogation situation, thus making the Jackson importation of these rules into the Sixth Amendment arena unnecessary.[9] In the limited situation where the Fifth Amendment rules would not apply – that is, non-custodial interrogations – the Court reasoned that the non-custodial setting would allow the defendant to much more easily avoid the potential police badgering by simply shutting his door or walking away.[10]

Because the Montejo Court specifically overruled Jackson, law enforcement officers are now free to approach defendants to request that they waive their Sixth Amendment right to counsel even after they have made an affirmative request for counsel in the past. The Legal Division has taken a conservative approach to interpreting this decision and recommends caution to officers who wish to avail themselves of this new freedom of action in such cases. The composition of the Supreme Court is not static (this was a 5-4 decision), and often new cases can be presented that cause the Court to limit its prior decisions to the specific facts of the case decided. The elimination of the Jackson rule makes the most sense in the "passive" invocation situation specifically presented in the Montejo case and the Court may later decide to limit this decision to the specific facts of that scenario. Thus approaching a represented defendant who has previously affirmatively asserted his Sixth Amendment right to counsel and clearly indicated his desire to have the assistance of counsel may entail some risk.

Military Application

So how does the Montejo decision impact the military application of the Sixth Amendment right to counsel? In general, service members enjoy all the same constitutional rights as other citizens, although in some cases they are applied somewhat differently due to the unique needs of military service. Beyond those basic rights, the Uniform Code of Military Justice and the rules promulgated by the President in the Manual for Courts-Martial give service members additional protections. In the case of the Sixth Amendment right to counsel, Military Rule of Evidence 305(e)(2) is on point.[11] The Sixth Amendment right to counsel attaches at the commencement of the adversary criminal proceedings. In the civilian context, the right attaches upon formal charging either by grand jury indictment or by criminal information filed by the United States Attorney, or when a defendant makes his initial appearance in court, whichever comes first. In the military context, the analogous event is the preferral of charges against an accused.[12]
Military Rule of Evidence 305(e)(2) implements in military practice the Sixth Amendment right to counsel as defined by the Supreme Court prior to Montejo. It states:

> (2) Post-preferral interrogation. Absent a valid waiver of counsel under subdivision (g)(2)(C), when an accused or person suspected of an offense is subjected to interrogation under circumstances described in subdivision (d)(1)(B) of this rule, and the accused or suspect either requests counsel or has an appointed or retained counsel, counsel must be present before any subsequent interrogation concerning that offense may proceed.[13]

The subdivision (d)(1)(B) reference describes circumstances making this a Sixth Amendment right to counsel issue, including interrogation conducted subsequent to the preferral of charges and concerning the offenses or matters that were the subject of the preferred charges.[14] The subdivision (g)(2)(C) reference implements the Michigan v. Jackson rule. It states:

> (C) If an accused or suspect interrogated under circumstances described in subdivision (d)(1)(B) requests counsel, any subsequent waiver of the right to counsel obtained during an interrogation concerning the same offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that the accused or suspect initiated the communication leading to the waiver.[15]

Interestingly, the language of these rules seems to anticipate the issue raised in Montejo, in that it distinguishes between the situation where counsel is merely appointed for the accused and the situation where the accused has affirmatively requested counsel. In the latter case, the rule presumes any subsequent waiver to be invalid unless the accused initiated the contact leading to the waiver. In the former case, where counsel has merely been appointed for the accused, law enforcement officers are free to approach the accused and ask for a waiver. This situation is

analogous to the "passive" invocation of counsel the Supreme Court addressed in Montejo, and in this case the military rule would lead to the same result.

In the wake of Montejo, one might question the viability of the military rule in the latter case where there has been an affirmative invocation of the right to counsel. While it is true that an unconstitutional rule cannot stand, there is manifold precedent validating rules that provide greater protection to an accused than required by the constitution. Unless the President decides to change the rule, law enforcement officers dealing with military accused must continue to follow the more restrictive rule.

The Future

While it is certainly possible that Military Rule of Evidence 305 may be amended to reflect the changes in the Supreme Court's treatment of the Sixth Amendment right to counsel, the process of changing these rules is almost never rapid or easy. Those familiar with the history of the "notice to counsel" provision first added to the rules, then later removed, will recognize the viscosity of such changes.[16] Both the military courts and the President in his rule-making capacity have tended to modify military rules in an effort to mirror the constitutional pronouncements of the Supreme Court. At the same time, strong and well-grounded arguments have been made to retain greater protections for service members in these situations.[17] Similar arguments have been made in favor of the more protective military rights warning procedures under Article 31 of the Uniform Code of Military Justice, which also pre-dated Miranda warnings.[18] In many ways, the potential for inherent coercion embodied in the military chain of command and military discipline provides a strong argument that such greater protections are justified.

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[1] Montejo v. Louisiana, 129 S. Ct. 2079 (2009).
[2] Michigan v. Jackson, 475 U.S. 625 (1986).
[3] *Id.* at 636.
[4] *Montejo*, 129 S. Ct. at 2086-87
[5] *Id.* at 2083-84.
[6] *Id.*
[7] *Id.* at 2087.
[8] *Id.* at 2088-90.
[9] *Id.* at 2090.
[10] *Id.*
[11] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e)(2) (2008).
[12] *Id.,* MIL. R. EVID. 305(e) analysis, at A22-16, stating that "in the context of military law, [the Sixth Amendment right to counsel] normally attaches when charges are preferred." *citing* United States v. Jordan, 29 M.J. 177, 187 (C.M.A. 1989); United States v. Wattenbarger, 21 M.J. 41 (C.M.A. 1985), *cert. denied*, 477 U.S. 904 (1986).
[13] *Id.,* MIL. R. EVID. 305(e) (2).
[14] *Id.*, MIL. R. EVID. 305(d)(1)(B).
[15] *Id.*, MIL. R. EVID. 305(g)(2)(C).
[16] *See* United States v. McOmber, 1 M.J. 380 (C.M.A. 1976); *overruled by* United States v. Finch, 64 M.J. 118 (C.A.A.F. 2006).
[17] *See, e.g., Finch,* 64 M.J. at 128-30. (Gierke, C.J., dissenting).
[18] *Id.* at 128.

CASE SUMMARIES
Circuit Courts of Appeals

1st Circuit

U.S. v. Figueroa-Cartagena, 2010 U.S. App. LEXIS 14619, July 16, 2010

Under *18 U.S.C. § 2119(3)* when a carjacking victim is taken hostage, the commission of the carjacking continues at least while the carjacker maintains control over the victim and his car. When the criminal conduct extends over a period of time, a latecomer may be convicted of aiding and abetting even if she did not learn of the crime at its inception, but knowingly assisted at a later stage.

In this case the defendant lent significant aid to the principals while they held the victim hostage in the car for several hours after she became involved. The defendant was not "merely present" at the scene of the crime. Her aid was essential to the scheme, and she may therefore be held liable as an aider and abettor.

The 6th and 9th circuits agree.

The court additionally held that the defendant's conviction for conspiracy to commit carjacking was proper. Even though there was no evidence to show that she was involved at the initial planning phase, the evidence of her later involvement provided a sufficient basis to infer that she knew of the co-defendants' plan, shared their common purpose, and acted to further their plan.

Click **HERE** for the court's opinion.

*****

U.S. v. Castro-Davis, 2010 U.S. App. LEXIS 14618, July 16, 2010

The government presented evidence that established a well orchestrated plot to carjack and kidnap the victim. The admission of one co-defendant's recorded statements from a telephone call to his mother did not violate the *Confrontation Clause of the Sixth Amendment*. Applying the analysis outlined in *Crawford v. Washington* (cite omitted) the court held that the statement was not made under circumstances that rendered it testimonial; therefore, it was admissible.

Click **HERE** for the court's opinion.

*****

Torres v. Dennehy, 2010 U.S. App. LEXIS 15313, July 27, 2010

The court affirmed the lower court's conclusion that the officers did not "deliberately elicit" information from Torres in violation of his *6th Amendment* right to counsel. While the officers served Torres with the indictment, he made spontaneous statements to them over their admonitions that he had the right to remain silent and the right to counsel. The officers further told Torres that they knew he had a lawyer, and that he should not say anything about the new charges.

Click **HERE** for the court's opinion.

*****

Giragosian v. Bettencourt, 2010 U.S. App. LEXIS 15670, July 29, 2010

Giragosian owned a gun shop. While Giragosian was training a customer to use a handgun, the customer committed suicide by intentionally shooting himself in the head. Along with their own investigation, the local police department contacted the ATF to request that ATF conduct an inspection of the gun shop. After observing several violations of federal firearms regulations the ATF inspector had Giragosian surrender his federal firearms license and seized ten custom gun frames lacking serial numbers from the gun shop.

Giragosian sued the ATF inspector under *Bivens*, claiming that the inspection and the ATF's seizure of his federal license and gun frames constituted an unlawful warrantless seizure in violation of the *Fourth Amendment*.

The court held that the ATF inspector did not violate Giragosian's *Fourth Amendment* rights by conducting a warrantless search, but rather the search constituted a lawful exercise of the government's power to inspect the inventory and records of licensed firearms dealers. Pursuant to *18 U.S.C. § 923(g)(1)(B)(ii)*, the government may conduct compliance inspections of gun shop premises without either a warrant or reasonable cause, as long as it does not do so more than once in any twelve-month period. The Supreme Court has explicitly upheld the constitutionality of this provision under the *Fourth Amendment*, holding that the "urgent federal interest" in regulating firearms traffic outweighs any threat to gun dealers' privacy. The ATF inspector's 2007 compliance inspection of Giragosian's gun shop was the first in twelve months, therefore it met all of the requirements of *§ 923(g)(1)(B)(ii)*.

Giragosian also argued that the ATF inspector's did not qualify as a lawful compliance inspection because he acted on a local police department's request. The court held that § *923* does not prohibit an ATF officer from conducting an inspection at the request of local law enforcement, nor is there any reason to think that Congress intended to prevent ATF officers from carrying out compliance inspections when they have a particular reason to be concerned that violations might exist.

Because no constitutional violation occurred with respect to the warrantless search, the ATF inspector was entitled to qualified immunity.

Click **HERE** for the court's opinion.

*****

3rd Circuit

U.S. v. Gatlin, 2010 U.S. App. LEXIS 14506, July 15, 2010

When a reliable tip is received that a person is carrying a concealed firearm, and that conduct is presumed to be a crime, an investigatory stop is within the bounds of *Terry*. Because the officers believed the defendant had a firearm they were permitted by *Terry* to conduct a limited search for weapons. (In Delaware it is presumed that persons carrying concealed handguns are violating the law. While it is possible to have a concealed handgun license, the burden is upon defendant to establish that he had a license to carry the concealed weapon).

Click **HERE** for the court's opinion.

*****

U.S. v. Marzzarella, 2010 U.S. App. LEXIS 15655, June 29, 2010

The court held that Marzzarella's conviction under *18 U.S.C. § 922(k)* for possession of a handgun with an obliterated serial number did not violate his *Second Amendment* right to keep and bear arms.

Click **HERE** for the court's opinion.

*****

5th Circuit

U.S. v. Roberts, 2010 U.S. App. LEXIS 14359, July 13, 2010

The officers acted well within their authority when they stepped into the defendant's apartment to place him under arrest, and then when they conducted a protective sweep of the apartment. Not only did they need to maintain control over the defendant and others present in the apartment, but other building residents had provided information that indicated that there were weapons in the apartment.

During the protective sweep of the apartment the officers seized a handgun and shotgun. Although the incriminating nature of the weapons was not immediately apparent, the court held that the officers were justified in temporarily seizing the weapons for the safety of themselves and the apartment's occupants.

The officers were entitled to maintain control over the weapons while they completed their investigation of the individuals inside the apartment. During that investigation the officers discovered that the defendant was an unlawful user of a controlled substance and that another occupant of the apartment was a convicted felon. At this time the illegality of the firearms became apparent and their permanent seizure was warranted.

Click **HERE** for the court's opinion.

*****

U.S. v. Pack, 2010 U.S. App. LEXIS 14562, July 15, 2010

A detention during a valid traffic stop does not violate the *Fourth Amendment* where it exceeds the amount of time needed to investigate the traffic infraction that initially caused the stop as long as:

1. The facts that emerge during the officer's investigation of the original offense create reasonable suspicion that additional criminal activity warranting additional present investigation is afoot,
2. The length of the entire detention is reasonable in light of the suspicious facts, and
3. The scope of the additional investigation is reasonable in light of the suspicious facts.

In this case, following a valid traffic stop for speeding, reasonable suspicion arose after the driver and passenger gave conflicting stories as to their travel history, the passenger appeared to be extremely nervous, and the pair was travelling on a drug trafficking corridor.

The court held that the officer's suspicion was entitled to significant weight because he had been a law enforcement officer for seventeen years, the length of the entire detention was reasonable in light of the suspicious acts observed, and the scope of the investigation conducted during the detention was reasonable. (The officer requested a canine unit, which responded, and the dog alerted to the trunk of the vehicle. A search of the trunk revealed 17.91 pounds of marijuana and a pistol).

Click **HERE** for the court's opinion.

*****

6th Circuit

Treesh v. Bagley, 2010 U.S. App. LEXIS 14260, July 13, 2010

A totality-of-the-circumstances test is applied when considering whether a delay between reading the *Miranda* warnings and custodial interrogation requires the interrogating officers to re-advise the suspect of his *Miranda* rights. Under *Wyrick v. Fields*, 459 U.S. 42 (1982), the court held that additional warnings are only required if the circumstances seriously change between the initial warnings and the interrogation.

In this case approximately two hours passed between the suspect's arrest, when he was initially *Mirandized*, and his interrogation by another officer. The lower court's conclusion that the second officer was not required to fully re-advise the suspect of his *Miranda* rights was not an unreasonable application of *Fields*.

The 5th, 7th, 8th, and 11th circuits agree.

Click **HERE** for the court's opinion.

*****

Simpson v. Jackson, 2010 U.S. App. LEXIS 14251, July 13, 2010

Simpson sought habeas relief following his convictions on a variety of charges arising from a fatal arson. He argued that the trial court improperly admitted statements he made to the police on four separate occasions.

In regard to the June 16th statement, Simpson argued that the officers violated *Miranda* when they questioned him after he expressed his desire to remain silent. Although he initially indicated a desire to remain silent, after the officer commented, "well that's up to you whether you want to talk to us or not, we're not going to twist your arm or anything like that," Simpson immediately responded by asking the officer what he wanted to talk about. The officers were faced with an individual who had indicated that he did not want to talk, and yet continued to talk. The court held that the officer's comment was a non-coercive statement, and it was not unreasonable or impermissible for the officers to have circled back to the *Miranda* issue to clarify whether the Simpson wished to waive his rights before asking him any substantive questions.

In regard to the June 20th statement, prior to a polygraph examination, the officer administering the polygraph *Mirandized* Simpson, who responded, "Oh, I can have an attorney present?" The officer told Simpson that he only needed a lawyer if he had lied, or intended to lie. The court held that someone in Simpson's position would think that if he requested an attorney that he would be admitting to lying, and that framing the issue in this way was "inherently coercive" and violated *Miranda*. The court noted that in doing so the officer crossed the line from stating the truth to distorting the truth and, arguably, to giving legal advice, and that officers run a high risk when they move into the realm of offering advice.

Simpson argued that both statements that he gave in April should have been suppressed. Simpson was in prison on unrelated charges when the officers questioned him without advising him of his *Miranda* rights. The lower court held that he was not in "custody" for *Miranda* purpose stating that simply being incarcerated did not, by itself, constitute "custody" for *Miranda* purposes.

However, the lower court cited a string of cases that relied on substantially different fact patterns where the incarcerated persons were questioned about something that happened in prison. The court held that *Mathis v United States*, 391 U.S. 1, (1968) controlled in this case. Here, as in *Mathis*, state agents unaffiliated with the prison isolated an inmate and questioned him about an unrelated incident without first giving *Miranda* warnings. Such action is improper and any resulting statement must be suppressed.

Click **HERE** for the court's opinion.

*****

U.S v. Geisen, 2010 U.S. App. LEXIS 14501, July 15, 2010
U.S v. Siemaszko, 2010 U.S. App. LEXIS 14497, July 15, 2010

The court affirmed the defendants' convictions for concealing material facts and making false statements to the Nuclear Regulatory Commission (NRC) in violation of *18 U.S.C. §§ 1001* and *1002.*

The government presented sufficient evidence to allow a rational juror to find that the defendants knew that statements made to the NRC were false, and that they permitted those material statements to be sent to the NRC.

Click **HERE** for the court's opinion (*Geisen*).

Click **HERE** for the court's opinion (*Siemaszko*).

*****

7th Circuit

U.S. v. Faulds, 2010 U.S. App. LEXIS 13887, July 8, 2010

The defendant's conviction for distribution of child pornography and possession of child pornography did not violate the *Double Jeopardy Clause of the Constitution*. When the contraband is a tangible object, like illegal drugs, distributing the contraband necessarily means giving up possession by transferring it to another. Once it is distributed, the contraband is no longer possessed, and its possession prior to the distribution is implicit in the distribution itself.

The same is not true with respect to distribution of digital depictions of minors being sexually exploited. The transmission of such material over the internet is in effect the transmission of a copy, allowing the owner to retain the original on his own computer. The defendant continued to possess the digital images on his own computer after he distributed identical images to the federal agent. His continued possession of the images after distributing them constituted separate and distinct crimes.

Click **HERE** for the court's opinion.

*****

Collins v. Gaetz, 2010 U.S. App. LEXIS 14261, July 13, 2010

Collins argued that the lower court improperly admitted his statement at trial because it failed to require the government to show that the police took "special care" in obtaining a voluntary waiver given his limited mental capacity.

The Supreme Court has said that when the police are aware of a suspect's mental defect but persist in questioning him, such dogged persistence can contribute to a finding that the waiver

was involuntary, and that a suspect's mental capacity is a factor that a court must consider in deciding whether a waiver was voluntary.

However, the Court has never held that police can render a waiver of *Miranda* rights involuntary simply by failing to take "special care" that a suspect with a mental disability understands his rights. Even if there were such a "special care" requirement, Collins produced no evidence that the officers who questioned him were aware of his mental deficiency.

Click **HERE** for the court's opinion.

*****

U.S. v. Skoien, 2010 U.S. App. LEXIS 14262, July 13, 2010

The defendant's conviction under *18 U.S.C. §922(g)(9)* for possession of a hunting shotgun, after he was convicted of a misdemeanor crime of domestic violence, does not violate his *Second Amendment* right to keep and bear arms as explained in *District of Columbia v. Heller* (cite omitted).

Click **HERE** for the court's opinion.

*****

U.S. v. Booker, 2010 U.S. App. LEXIS 14411, July 14, 2010

When the defendant showed up in a vehicle matching the description provided by the confidential source, at the time he and the confidential source had agreed upon, agents had sufficient evidence to conclude that there was a fair probability the suspect was in possession of the large quantity of crack cocaine that he was supposed to sell. Therefore, the defendant's arrest and search of his truck were valid.

The court further held that the information provided by the confidential source to the agents was credible. The totality of the information available to the DEA fully supported the inference that the defendant was a drug dealer because a prior buyer (the confidential source) identified the defendant as such, the defendant's background matched this occupation, and the defendant agreed to sell drugs to the confidential source in a recorded telephone call.

Click **HERE** for the court's opinion.

*****

Portis v. City of Chicago, 2010 U.S. App. LEXIS 15258, July 23, 2010

The district court held that if it took police officers more than two hours to process and release individuals arrested for fine only offenses, then that detention was unreasonable and violated the *4th Amendment*.

The court rejected this bright-line rule, holding that "reasonableness" was the proper standard to apply since detainees' circumstances differ from each other. While an individual detainee may be able to show that he was detained for an unreasonable amount of time, he must do so without the benefit of a two-hour cap.

Click **HERE** for the court's opinion.

*****

8th Circuit

U.S. v. Finley, 2010 U.S. App. LEXIS 14579, July 16, 2010

The court held that, although there was a false statement made in the search warrant affidavit prepared by the ICE agent, there was no proof that it was a knowingly or recklessly made false statement; therefore, Finley's motion to suppress was properly denied.

Click **HERE** for the court's opinion.

*****

U.S. v. Young, 2010 U.S. App. LEXIS 14656, July 19, 2010

Although the undercover officer posing as a fourteen-year old girl named "Emily" alluded to sex in some of the online chats, Young initially contacted Emily, and it was Young who initiated the majority of the sexual discussions, supporting the conclusion that he was not induced by the government.

Young was the one who brought up the topic of a sexual encounter at the Super 8 Motel, and who reserved a room. Although Emily pretended to be receptive of Young's sexual suggestions, and was portrayed as a sexually precocious teen-ager, the government did not "implant the criminal design" in Young's mind. The district court's refusal to instruct the jury on an entrapment defense was proper.

The court further held that even if Young had established that the government induced his criminal conduct, that he was predisposed to commit the crime. The evidence of Young's numerous other internet chats, during which he attempted to arrange meetings with minors for sexual encounters, clearly showed his predisposition to commit this crime.

Click **HERE** for the court's opinion.

*****

U.S. v. Garcia, 2010 U.S. App. LEXIS 14959, July 21, 2010

The court held that at the conclusion of a lawful traffic stop, the post-stop the encounter between Garcia and the officer was consensual. After receiving the warning ticket, Garcia's behavior

indicated that he felt free to leave. He asked the officer about the location of a pharmacy, and he voluntarily answered some questions posed by the officer.

During this consensual encounter the court held that Garcia voluntarily gave the officer consent to search his trailer which yielded packages of marijuana.

Click **HERE** for the court's opinion.

*****

U.S. v. Horton, 2010 U.S. App. LEXIS 15245, July 26, 2010

The court held that the officers had reasonable articulable suspicion to stop, then frisk Horton, and that they did not exceed the permissible scope of the stop.

Before initiating the stop the officers had received information from the cab driver regarding Horton's odd behavior and the possibility that he was carrying a knife. Horton matched the physical description, and the officers witnessed Horton flight upon seeing them.

The officers' detention of Horton was reasonable. During the initial stop the officers discovered that Horton was traveling under a different name than he originally gave them, he gave the officers multiple dates of birth, and told inconsistent stories as to why he was in town. Traveling under an assumed name and failing to provide identification are factors that, when taken in combination with other circumstances, can provide the necessary suspicion to expand the investigation.

Click **HERE** for the court's opinion.

*****

U.S. v. Carlson, July 27, 2010 (LEXIS cite unavailable as of 8/6/10)

The court held that Carlson's meeting with the officers was non-custodial and voluntary; therefore, his statements were properly admitted against him at trial.

The officers met with Carlson at a public restaurant and told him at the beginning of the meeting that he was not under arrest and that he was free to leave at any time. The officers did not restrain Carlson's freedom in a fashion similar to a formal arrest because they made sure that he sat on the outside of the booth in the restaurant.

Click **HERE** for the court's opinion.

*****

U.S. v. Golinveaux, 2010 U.S. App. LEXIS 15496, July 28, 2010

The court held that Golinveaux's consent to the search of her car was voluntary. She was fifty years old, had thirteen years of education, did not suffer from any mental disability and there was

no evidence that she was under the influence of drugs at the time she consented to the search.

At most, Golinveaux was in police custody for thirty-eight minutes before she gave consent to search, and was subject to the possible physical intimidation and the officer's "dangerous chemical" speech for less than twenty three minutes. The court did not believe that, in such a short time, an experienced criminal, such as Golinveaux, particularly given her history of assaulting law enforcement officers, was so overcome by police authority as to make her consent involuntary.

Click **HERE** for the court's opinion.

*****

9th Circuit

U.S. v. Burkett, 2010 U.S. App. LEXIS 14815, July 20, 2010

The court held that the record developed during the suppression hearing amply supported a conclusion that the "stop and frisk" in this case was reasonable. In the totality of the circumstances, the highly experienced State Trooper had good reason to suspect that Burkett was armed and dangerous, and that a pat-down search was necessary to ensure the officer's safety.

Objectively viewed, Burkett's furtive movements during the time the driver was refusing to comply with the order to stop her vehicle, his evasive and deceptive responses when asked what he was doing at that time, the peculiar way he opened the door with his left hand, and the way he kept his right hand near and reached for his right coat pocket when he got out of the vehicle, would justify an experienced law enforcement officer's belief that Burkett was armed and dangerous.

Click **HERE** for the court's opinion.

*****

10th Circuit

Mink v. Knox, 2010 U.S. App. LEXIS 14684, July 19, 2010

Mink, a college student, created a fictional character for the editorial column of his internet-based journal that was a parody of one of the professors at the college. The professor complained, and the police department initiated an investigation into a possible violation of Colorado's criminal libel statute.

Deputy District Attorney Knox reviewed and approved a search warrant and search warrant affidavit for Mink's home. The police searched Mink's house and seized his personal computer and other written materials referencing his online journal. The District Attorney subsequently determined that the statements contained in Mink's journal could not be prosecuted under the state's criminal libel statute. Mink brought an action against Knox under *42 U.S.C. § 1983*.

The court previously held that Knox was not entitled to absolute immunity since she "was not wearing the hat of an advocate," when she reviewed the affidavit in support of the warrant.

The court now held that Knox was not entitled to qualified immunity stating, "Because a reasonable person would not take the statements in the editorial column as statements of facts by or about Professor Peake, no reasonable prosecutor could believe it was probable that publishing such statements constituted a crime warranting search and seizure of Mr. Mink's property."

Additionally, the court held that the search warrant was overly broad since there was no reference to any particular crime. The warrant authorized the search and seizure of all computer and non-computer equipment and written material in Mink's house, without any mention of any particular crime to which they may be related, essentially authorizing a "general exploratory rummaging" through Mink's belongings for any unspecified "criminal offense."

The court held that at the time Knox reviewed the search warrant and affidavit it was clearly established that speech, such as parody and rhetorical hyperbole, which cannot reasonably be taken as stating actual fact, enjoyed the full protection of the *First Amendment* and therefore could not constitute the crime of criminal libel for purposes of a probable cause determination. It was also clearly established that warrants must contain probable cause that a *specified crime* has occurred and meet the particularity requirement of the *Fourth Amendment* in order to be constitutionally valid.

Click **HERE** for the court's opinion.

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U.S. v. Vincent, July 27, 2010 (LEXIS cite unavailable as of 8/6/10)

A defendant is entitled to a jury instruction on entrapment only when the government conduct is such that a reasonable jury could find that it "creates a substantial risk that an un-disposed person or otherwise law-abiding citizen would commit the offense."

While Vincent may well have felt indebted to his friend, who unbeknownst to him was acting as a confidential informant, a reasonable jury could not conclude that his benevolence to Vincent and invocations of sympathy created a substantial risk that an otherwise law-abiding citizen would take up the methamphetamine trade.

Click **HERE** for the court's opinion

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11th Circuit

Hall v. Thomas, 2010 U.S. App. LEXIS 14812, July 20, 2010

Hall sought habeas relief from his state court convictions for robbery and kidnapping arguing that his audiotaped confession was involuntary, coerced and made without a knowing and

intelligent waiver of his right to counsel. Hall was fifteen years and eleven months old at the time he confessed.

The totality of the circumstances here indicated that Hall's waiver of his *Miranda* rights and his subsequent confession were knowing, intelligent, and voluntary. The officers read Hall his state juvenile rights twice and his adult *Miranda* rights twice. Hall himself also read his state juvenile and adult *Miranda* rights. Thus, Hall was told twice, and read himself once, that he had a right to have a parent present during questioning if he wanted.

Hall confirmed on the audiotape that the officers had read him his state juvenile rights and adult *Miranda* rights twice and that he understood those rights. During his audiotaped confession, Hall also acknowledged that he had signed the forms waiving his *Miranda* rights. The transcript and audiotape of Hall's confession gave no indication whatsoever that Hall was confused or misunderstood the seriousness of the interrogation or the questions he was being asked.

The transcript and audiotape recording of his confession revealed no evidence that he was mistreated by the police, tricked, or coerced into waiving his rights or confessing. When asked during his audiotaped confession whether he had been threatened, Hall stated that he had not been threatened. On the audiotape, Hall confessed to the crime in detail and gave no indication that he was fed facts by the officers, as he now claims, that he was frightened into confessing, as he now claims, or that he did not understand, as he now claims. The transcript of the confession confirms its voluntariness.

Click **HERE** for the court's opinion.

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District of Columbia Circuit

U.S. v. Moore, 2010 U.S. App. LEXIS 15311, July 27, 2010

Moore was charged with a violation of *18 U.S.C. § 1001(a)(2)* after he signed a false name to a U.S. Postal service delivery form. Moore signed for a package containing powder cocaine that was part of a controlled delivery by U.S. Postal Inspectors.

The court held that a statement is material if it has a natural tendency to influence, or is capable of influencing, either a discrete decision or any other function of the agency to which it was addressed.

In this case, Moore's false statement was capable of affecting the Postal Service's general function of tracking packages and identifying the recipients of packages entrusted to it.

The 1st, 5th, 6th 7th and 11th circuits agree.

Click **HERE** for the court's opinion.

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